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No. 81-2300

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THALIA KELLY CONSIDINE

and

CHARLES RAY CONSIDINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

W. Lee McLane, Jr.
Nola McLane
2970 Valley Bank Center
Phoenix, Arizona 85073
(602) 254-5346
Attorneys for Petitioners

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26 U.S.C. § 6501(c)(1) 3,4,5

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REPLY BRIEF FOR PETITIONERS

It is common knowledge among experienced counsel in the federal courts that some judges do not follow Supreme Court decisions with which they disagree.* The instant Petition sets forth a good example of that practice. To the extent that certiorari is denied in such a case, a Supreme Court decision has been overturned by a lower federal court, and the offending judges have been encouraged to repeat the process. Moreover, the strain of defending such errant decisions usually forces a litigant to offer new and strange arguments in an attempt to rationalize

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* A variety of techniques too numerous to list are used to camouflage this refusal. One example is to make distinctions where none are intellectually possible. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 48, n. 14 (1977). Another is to pay lip service to the rule itself while resting an avoidance of its application on an erroneous reading of a subsidiary rule, the instant case.

them or to remain silent on the point raised by the Petition. The United States has chosen the latter course here, as is shown hereinafter.

The Petition argues that:

1. The prior criminal perjury judgment "need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue" in the present proceeding, and "so far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." Yates v. United States, 354 U.S. 298, 338 (1957). The opinion, citing from The Evergreens v. Nunan, 141 F.2d 927, 931 (2nd Cir. 1944), held that "we do not hesitate to hold that, even assuming arguendo that 'mediate data', decided in the first suit, conclusively established facts 'ultimate' in the second, no fact decided in the

first, whether 'ultimate' or a 'mediate datum', conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit." That is, unless the findings of fact that Charles Considine had additional interest income of $9,975 and overstated a charitable contribution by $8,876.24 are ultimate facts in the present section 6501(c)(1) proceeding, the Petitioner is not barred by collateral estoppel from proving that there was no such additional interest income or overstated deduction. Thus, the United States is wrong when it states, at page 5 of its Memorandum, that Yates and Evergreens "hold that the doctrine of collateral estoppel makes conclusive in subsequent proceedings determinations of fact and mixed fact and law questions that were essential to the prior decision." Those cases hold no such thing at all.

What they hold is that it is only those determinations of fact from the prior proceeding which are ultimate facts in the later proceeding that are barred from litigation in the subsequent proceeding.

2. In the present section 6501(c)(1) proceeding (opening the statute of limitations to permit an assessment herein), the ultimate issue of fact is not whether the Petitioner had additional income from interest and overstated a charitable deduction, but is whether the return filed was false or fraudulent with the intent to evade tax. See Amos v. Commissioner, 43 T.C. 50, 55-56, n. 6 (1964), interpreting section 6653(b) which has the same ultimate issue of fact. "The willful filing of an income tax return omitting income (or overstating a charitable deduction) is a fact which if true may, together with

further facts, be a basis from which an intent to evade tax may be inferred," but "it is not an ultimate fact in a section 6653(b) proceeding" (whether an underpayment of tax is due to intent to evade tax). Goodwin v. Commissioner, 73 T.C. 215, 246-247 (1979).

Therefore, unless the Court of Claims was correct in its contrary ruling that the understatement of income and overstatement of a deduction were ultimate facts in this section 6501(c)(1) proceeding, its opinion clearly violates Yates. In contrast to Petitioners' argument and citation to Amos and Goodwin, the United States is silent on this point.

CONCLUSION

In the first criminal perjury proceeding, Petitioners were prohibited from defending the section 7206(1) charge on the ground that there was no intent to

evade tax. Now the Court of Claims has ruled that, under the doctrine of collateral estoppel, the facts established in the first proceeding may not be relitigated here in this second proceeding and are sufficient to permit the Court to infer intent to evade tax. Yates does not permit such a denial of due process.

Respectfully submitted,

W. Lee McLane, Jr.

Nola McLane
2970 Valley Bank Center
Phoenix, Arizona 85073
Attorneys for Petitioners

September 3, 1982

CERTIFICATE OF SERVICE

I, W. Lee McLane, Jr., attorney for Petitioners and a member of the Bar of this Court, certify that this Brief was served upon Respondent's counsel of record by depositing three copies in the United States mail on September 3, 1982, first-class postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served were served.

W. Lee McLane, Jr.